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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

NORTHPEAK WIRELESS, LLC,
Plaintiff,
v.
3COM CORPORATION, *et al*,
Defendants.

Case No: 3:09-cv-00602-SI

JOINT CASE MANAGEMENT STATEMENT

Judge: The Honorable Susan Illston
Courtroom 10, 19th Floor

Pursuant to the Court's Order setting a Further Case Management Conference (Dkt. No. 524) and Judge Illston's Standing Orders, Plaintiff NorthPeak Wireless, LLC ("NorthPeak"), Defendants¹, and Intervenor Intel Corporation ("Intel") hereby jointly submit this Joint Case Management Statement.

I. JURISDICTION AND SERVICE

This is a patent infringement action brought pursuant to 35 U.S.C. § 101, *et seq.* This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338. On January 21, 2009, the U.S. District Court for the Northern District of Alabama granted Defendants' motion to transfer venue to the Northern District of California. NorthPeak opposed the motion to transfer and contends that it is not subject to jurisdiction in California. All parties have been served.

II. FACTS

NorthPeak initially alleged that Defendants and intervenor Intel had infringed two patents: U.S. Patent No. 4,977,577 ("the '577 Patent") and US Patent No. 5,987,058 ("the '058 Patent"), both of which expired on November 2, 2008. The patents were subjected to reexamination after NorthPeak filed this action. The Patent Office issued reexamination certificates canceling the asserted claims of the '058 Patent and confirming the patentability of the asserted claims of the '577 Patent.

The '577 Patent is entitled "Wireless Alarm System." NorthPeak asserts that the Patent

¹ "Defendants" refers to 3Com Corporation ("3Com"), ACER America Corporation ("Acer America"), ASUS Computer International ("ASUS"), Belkin International Inc. ("Belkin"), Buffalo Americas, Inc. ("Buffalo"), Dell, Inc. ("Dell"), D-Link Systems, Inc. ("D-Link"), Epson America, Inc. ("Epson"), Fujitsu America, Inc. ("FAI"), Gateway, Inc. ("Gateway"), Hewlett-Packard Company ("HP"), NETGEAR, Inc. ("NETGEAR"), SMC Networks, Inc. ("SMC"), SonicWALL, Inc. ("SonicWALL"), Sony Electronics Inc. ("SEL"), Sony Computer Entertainment America LLC, a successor-in-interest to Sony Computer Entertainment America Inc. ("SCEA"), Toshiba America Information Systems, Inc. ("TAIS"), Trendnet Systems, Inc. ("Trendnet"), Trendware International, Inc. ("Trendware"), U.S. Robotics Corporation ("U.S. Robotics"), ViewSonic Corporation ("ViewSonic"), WatchGuard Technologies, Inc. ("WatchGuard"), Zonet USA Corporation ("Zonet"), Zyxel Communications, Inc. ("Zyxel").

1 generally claims certain types of spread spectrum wireless transmitters and methods and is
2 infringed by WiFi-enabled devices sold by Defendants and Intel that comply with the 802.11b
3 wireless standard. Defendants and Intel disagree and further contend that the '577 Patent is
4 invalid and is unenforceable under the doctrines of inequitable conduct and/or unclean hands as a
5 result of the conduct of the inventors and the prior assignee of the patents – Axonn Corporation.
6 Defendants and Intel also contend that Plaintiff's ability to recover damages is limited because of
7 Plaintiff's predecessor's failure to comply with the patent marking requirements of 35 U.S.C. §
8 287.

9 **III. LEGAL ISSUES**

- 10 1. The construction of the asserted claims of the '577 Patent.
11 2. The alleged infringement of the '577 Patent by Defendants and Intel.
12 3. The alleged invalidity of the '577 Patent.
13 4. The defenses and counterclaims asserted by Defendants.
14 5. The alleged unenforceability of the '577 Patent.
15 6. NorthPeak's claim for damages.

16 **IV. MOTIONS**

17 **a. Prior Motions**

18 On December 5, 2008, Zonet, Trendnet, and Trendware filed motions to dismiss for lack
19 of jurisdiction in the U.S. District Court for the Northern District of Alabama. [Dkt. 122, 123,
20 124] Also on that day, Zyxel filed a motion to dismiss for lack of jurisdiction and improper
21 venue pursuant to Fed. R. Civ. P. Rule 12(b)(2) and (3). [Dkt. 149]

22 On December 16, 2008, several of the defendants jointly filed a motion to transfer venue
23 to the Northern District of California. [Dkt. 169] On January 20, 2009, Intel filed a motion to
24 intervene. [Dkt. 215]

25 On January 21, 2009, the U.S. District Court for the Northern District of Alabama issued
26 an order that: (1) granted the motion to transfer; (2) held that Zonet, Trendnet, Trendware, and
27 Zyxel's motion to dismiss was moot; and (3) ordered that the pending motion to intervene by
28 Intel would be resolved in the Northern District of California. [Dkt. 224]

1 On March 6, 2009, Intel filed a new motion to intervene with this Court, which granted
 2 the motion on March 27, 2009. [Dkt. 286]

3 On March 10, 2009, Defendants filed an Administrative Motion in *LifePoint v. Cargill*
 4 (Case No. C-93-20352-JW) to Consider Whether Cases Should Be Related. On March 13, 2009,
 5 the Honorable James Ware denied the motion. [Dkt. 297]

6 After the Initial Case Management Conference, this Court set a limit of seven terms to be
 7 construed. [Dkt. 398]

8 On August 28, 2009, the Court entered the parties' stipulation to stay the action pending
 9 reexamination of the patents-in-suit. [Dkt. 426]

10 **b. Pending or Anticipated Motions**

11 The parties anticipate briefing under the Patent Local Rules.

12 The parties also anticipate that they may file motions seeking summary judgment on one
 13 or more aspects of the claims, counterclaims, and defenses asserted in this litigation. For
 14 example, Plaintiff expects to file a motion for summary judgment of no invalidity and possibly
 15 infringement, and Defendants anticipate filing one or more motion for summary judgment on
 16 noninfringement and on one or more of their defenses, such as laches and/or or compliance with
 17 35 U.S.C. § 287.² The parties expect to file pre-trial motions, such as motions in limine, and
 18 may file discovery motions if the need arises.

19 Intel and certain of the Defendants believe that the Court and the parties would benefit
 20 from focused early summary judgment motions directed to the specific elements of the asserted
 21 claims in the '577 Patent that were defined in the recently-concluded reexamination proceedings
 22 at the PTO. Plaintiff believes that summary judgment motions are premature before the Court
 23 has construed the terms in the '577 Patent and the Parties have completed fact and expert
 24 discovery.

25
 26 _____
 27 ² To the extent that § 5 of Court's Standing Order limits Intel and Defendants to collectively
 28 filing a single motion for summary judgment, Intel and Defendants anticipate that they may
 request leave of Court to file their own party-specific motions for summary judgment. The
 parties will meet and confer at the appropriate time.

1 **V. AMENDMENT OF PLEADINGS**

2 The parties are unaware of any proposed amendments. The parties propose that any
3 amendments to pleadings or parties take place by March 13, 2015.

4 **VI. EVIDENCE PRESERVATION**

5 All parties have been advised by their counsel to preserve all relevant evidence, including
6 electronically stored evidence, if any.

7 **VII. DISCLOSURES**

8 The parties timely served their initial disclosures prior to the entry of the stay.

9 **VIII. DISCOVERY**

10 **a. Discovery To Date**

11 Prior to the stay, the parties served and responded to initial document requests and
12 interrogatories. The parties also served several third-party subpoenas. The parties have not taken
13 any depositions or expert discovery in this case. Since the stay has lifted, the parties have served
14 additional third-party subpoenas and discovery requests.

15 Intel believes that Plaintiff's preliminary infringement contentions concerning its
16 products are wholly inadequate. Intel made available the technical information about its accused
17 products more than six years ago (and before Plaintiff served its preliminary infringement
18 contentions). Nevertheless, Plaintiff's contentions suffer from numerous deficiencies. Among
19 other things, they do not specify where the claim limitations can allegedly be found, they do not
20 identify the corresponding structures for the means-plus-function limitations, and the allegations
21 regarding indirect infringement and the doctrine of equivalents are mere boilerplate. Plaintiff
22 disagrees that its infringement contentions are inadequate, as they contain the technical detail
23 that was reasonably available to Plaintiff at the time. Defendants and Intel served hundreds of
24 thousands of pages of documents on Plaintiff just three weeks before Plaintiff served roughly 30
25 sets of infringement contentions. Additionally, discovery in this case was stayed for nearly five
26 years at the request of Intel and Defendants shortly after Plaintiff served its contentions.
27 Nevertheless, Plaintiff's new counsel has been negotiating a compromise with counsel for Intel
28 and expects to amend its infringement contentions as to Intel shortly. If the Parties are unable to

1 reach agreement Intel anticipates that it may need to file a motion. If they reach an agreement,
 2 Plaintiff expects to file an unopposed motion for leave to serve amended infringement
 3 contentions as to Intel in the next few weeks.

4 **b. Discovery Limitations**

5 The parties have agreed on the following discovery limitations, except where noted. In
 6 addition, for each of the following discovery limitations, the parties disagree on the treatment of
 7 groups of defendants that are related, as follows: [Defendants propose that any group of
 8 defendants related as parent/subsidiary or that are under common ownership or control should be
 9 considered to be a single “Defendant” and a single “party” for the purposes of the following
 10 limitations. Defendants believe this proposal would remove all ambiguity of how these
 11 discovery limitations would apply to such related entities, e.g., HP/3Com.³] [Plaintiff opposes
 12 such Defendant grouping and proposes that each defendant, regardless of any relationship to any
 13 other defendant, should be considered to be a separate “Defendant” and a separate “party” for the
 14 purposes of the following limitations. Plaintiff notes that the below discovery limits were
 15 negotiated—and the pre-stay Case Management Statement filed—without reference to such
 16 “Defendant groups.” See Dkt. No. 389. Plaintiff served discovery requests before the stay was
 17 entered with the understanding that each entity was a separate Defendant. Defendants responded
 18 to such discovery requests individually—not as Defendant groups. Additionally, Plaintiff’s
 19 infringement contentions and accused instrumentalities are distinct as to each individual
 20 Defendant.]

21 **i. Interrogatories**

22 The Plaintiff may serve up to twenty five (25) interrogatories total on each Defendant and
 23 Intel. The Defendants may serve fifteen (15) common interrogatories on the Plaintiff and an
 24 additional ten (10) individual interrogatories may be served by each Defendant on the Plaintiff.
 25 Plaintiff asks that the Court impose the same limitations on Intel, which intervened after the
 26 original parties’ agreement. Intel believes it is entitled to serve twenty-five (25) interrogatories

27
 28³ HP completed its acquisition of 3Com in April 2010, after this case was stayed.

1 on Plaintiff as provided in Fed. R. Civ. P. 33(a)(1).

2 **ii. Request for Admissions**

3 Each party may serve up to fifty (50) requests for admissions on any other party, except
4 that any party may issue an unlimited number of Requests for Admissions seeking authentication
5 of documents.

6 **iii. Depositions for Parties and Third-Parties**

7 The Plaintiff shall be entitled to take four hundred fifty (450) hours of deposition
8 testimony total of parties and third-parties, exclusive of designated expert witnesses (but no more
9 than 28 hours of depositions as to each Defendant and to Intel).

10 The Defendants and Intel shall be entitled to take a total of three hundred fifty (350)
11 hours of deposition testimony total of parties and third-parties, exclusive of designated expert
12 witnesses.

13 Absent agreement, no deposition of a fact witness under Fed. R. Civ. P. 30(b)(1) shall
14 exceed 7 hours, except that an individual inventor may be deposed for up to [Plaintiff proposes
15 10 hours] [Defendants and Intel propose 14 hours].

16 **iv. Expert Depositions**

17 The parties agree that additional deposition time will be permitted for experts whose
18 reports are directed to more than one defendant or who submit more than one report. The Parties
19 will meet and confer in good faith to agree on specific time limitations on expert depositions
20 after service of the Parties' respective expert reports.

21 **v. Depositions Requiring Translators**

22 [Plaintiff proposes that the time limit for any deposition requiring the use of a translator
23 shall be doubled, but only half the hours used will count against the party's total deposition time
24 in this action (such that, for example, a fact witness requiring a translator may be deposed for up
25 to fourteen (14) total hours, which will count for up to seven (7) hours for purposes of
26 calculating deposition hours used)]. [Defendants and Intel propose that the time limit for any
27 deposition requiring the use of a translator shall be increased by fifty percent, but only the actual
28 hours used will count against the party's total deposition time in this action (such that, for

1 example, a fact witness requiring a translator may be deposed for up to ten and one half hours,
2 which will count for up to seven hours for purposes of calculating deposition hours used)].

3 **vi. Discoverability of Certain Expert Materials**

4 The parties agree that testifying experts' draft reports, notes, and outlines of draft reports
5 shall not be subject to discovery in this case, nor shall any such drafts, notes or outlines of draft
6 reports that the testifying expert prepared in other cases, be subject to discovery in this case.

7 The parties further agree that discovery of materials provided to a testifying expert and
8 the expert's communications in connection with his or her role as a testifying expert in this
9 litigation shall be limited to subject matter that is relevant to those materials, facts, consulting
10 expert opinions, and other matters actually relied upon by the testifying expert in forming his or
11 her final report, trial or deposition testimony, or any opinion in this case. Notwithstanding the
12 foregoing, an expert who is also a fact witness may be subject to discovery concerning his or her
13 relevant factual knowledge.

14 **vii. Privilege Log**

15 The parties agree that privileged and/or work product documents created by any party
16 after the filing of the Complaint do not need to be logged. Plaintiff proposes that privileged
17 and/or work product documents that were created since January 1, 2008 as part of the pre-filing
18 investigation of this infringement case also do not need to be logged. Defendants and Intel
19 oppose this proposal.

20 **viii. Modification**

21 The above limitations may be modified by agreement of the parties or further Order of
22 the Court.

23 **c. E-discovery**

24 The parties agree to negotiate in good faith regarding the scope of electronic discovery
25 and believe that they will be able to submit a proposed joint E-discovery order for the Court's
26 consideration.

27 **IX. CLASS ACTIONS.**

28 This is not a class action.

1 **X. RELATED CASES.**

2 On March 10, 2009, Defendants filed an administrative motion in *LifePoint v. Cargill*
3 (Case No. C-93-20352-JW) to consider whether this case should be related to that one. On
4 March 13, 2009, the Honorable James Ware denied the motion. [Dkt. 297] The parties are not
5 aware of any other cases that might be considered to be “related” to the present action.

6 **XI. RELIEF**

7 NorthPeak seeks damages in an amount to be proven at trial for patent infringement,
8 interest, attorneys’ fees, costs, and any other relief that the Court deems just and equitable.
9 Defendants and Intel seek declarations of non-infringement and invalidity, as well as attorneys’
10 fees and costs.

11 **XII. SETTLEMENT AND ADR**

12 As required by ADR L.R. 3-5, counsel for the parties have discussed the available ADR
13 options. The parties are willing to participate in some form of mediation. The parties have
14 agreed to discuss in good faith the format of mediation and will endeavor to conduct the
15 mediation in a manner that is as efficient as possible.

16 **XIII. CONSENT TO MAGISTRATE FOR ALL PURPOSES**

17 Intel and the Defendants are willing to consent to the assignment of this case to a
18 Magistrate Judge for all purposes under the following conditions: the case is and remains
19 assigned to Magistrate Judge Paul S. Grewal and Judge Grewal has no impediment to presiding
20 over the case. NorthPeak does not consent to the assignment of this case to a Magistrate Judge.

21 **XIV. OTHER REFERENCES**

22 The parties do not believe that this suit is suitable for reference to binding arbitration or a
23 special master.

24 **XV. NARROWING OF ISSUES**

25 The parties expect that the patent claim construction decision of disputed claim terms
26 (pursuant to the process set out in the Patent Local Civil Rules) may help to narrow the issues in
27 dispute. Currently, Plaintiff is asserting 5 claims, and Defendants and Intel are asserting 154
28 prior art references. To streamline the issues for trial, Plaintiff proposes that the Court set

1 deadlines for the Parties to limit the number of asserted claims, prior art references, and
 2 obviousness combinations. Specifically, Plaintiff proposes that (1) Plaintiff be limited to 4
 3 asserted claims; (2) Defendants and Intel, collectively, be limited to 8 unique prior art references;
 4 and (3) Defendants and Intel, collectively, be limited to a total of 4 unique bases of prior-art
 5 invalidity per asserted claim, where a basis is an anticipation reference or a specific obviousness
 6 combination of two or more of those 8 references that Defendants and Intel intend to assert.
 7 Plaintiff proposes that the deadlines for such limits be discussed and decided at the further case
 8 management conference following the Court's Claim Construction Order. Defendants and Intel
 9 are willing to meet and confer with Plaintiff on this issue after claims construction.

10 **XVI. EXPEDITED TRIAL PROCEDURE**

11 The parties do not believe that this case can be handled under the Expedited Trial
 12 Procedure of General Order No. 64 Attachment A.

13 **XVII. SCHEDULING ISSUES**

14 The parties propose the following schedule that goes through the claim construction
 15 hearing, pursuant to Patent Local Rule 4-6. The proposed schedule follows the deadlines set in
 16 the Patent Local Rules. Given the number of parties in the case and that the claim construction
 17 ruling may substantially impact the posture of the case, the parties propose that, when the court
 18 issues its claim construction ruling, it set a further Case Management Conference to establish the
 19 remaining schedule for this case, up to and including trial.

20

| 21 Event | 22 Proposed Date |
|--|-------------------------|
| 23 Case Management Conference | 24 February 13, 2015 |
| 25 Proposed Terms for Construction (Patent L. R. 4-1) due | 26 March 6, 2015 |
| 27 Preliminary Claim Constructors and Extrinsic Evidence (Patent L. R. 4-2) due | 28 March 27, 2015 |
| Joint Claim Construction and Prehearing Statement (Patent L. R. 4-3) and claim construction expert reports due | April 21, 2015 |

| | | |
|----|--|----------------------------|
| 1 | Last day for discovery relating to Claim Construction (Patent L. R. 4-4) | June 5, 2015 |
| 2 | | |
| 3 | Opening Claim Construction Brief (in compliance with Patent Local Rule 4-5(a)) due | June 19, 2015 |
| 4 | | |
| 5 | Opposing Claim Construction Brief(s) (in compliance with Patent Local Rule 4-5(b)) due | July 17, 2015 |
| 6 | | |
| 7 | Reply Claim Construction Brief(s) (in compliance with Patent Local Rule 4-5(c)) due | July 31, 2015 |
| 8 | | |
| 9 | | |
| 10 | Claim Construction Hearing (in compliance with Patent Local Rule 4-6) due | On or after August 7, 2015 |
| 11 | | |

12

13 At the further Case Management Conference following the claim construction ruling,
 14 Intel anticipates seeking to sever and sequence the case to simplify and streamline the
 15 proceedings and resources needed to reach resolution for both the Court and the parties. Briefly,
 16 NorthPeak named more than 20 different manufacturers or suppliers of end products having
 17 WiFi chips in the original complaint. Its infringement allegations take aim at the semiconductor
 18 chips involved in transmit functions in those devices. Collectively, the Defendants' accused
 19 devices used semiconductor chips supplied by a wide range of chip manufacturers. Intel is the
 20 only chip manufacturer that intervened in the case. Seven of the defendants are accused of
 21 infringing the NorthPeak patents by selling computers that incorporate Intel's wireless
 22 semiconductor chips.

23 Intel's motion will seek to sever the claims against it from the remainder of the case. The
 24 motion will also propose that the remaining claims in the case be stayed while the case against
 25 Intel proceeds. Resolving the case against Intel first will, as a practical matter, dispose of the
 26 claims against the Defendants that are based on the use of Intel's wireless semiconductor chips.
 27 Focusing first on the Intel case is also likely to simplify and shorten the process of adjudicating
 28 the rest of the case. At this point, Intel has already produced the technical information about its

1 accused semiconductor chips and is in a position to move expeditiously to position the case for
 2 resolution by motion or trial. Plaintiff has had possession of that Intel discovery for six years,
 3 since before the stay was entered. In contrast, the balance of the case will depend on information
 4 about wireless semiconductor chips from many other vendors—information that Defendants do
 5 not have and cannot provide to Plaintiff. Thus, Intel believes that the discovery period required
 6 for the non-Intel portion of the present dispute will be much longer than the discovery period
 7 needed for the Intel portion.

8 As an alternative to staying the non-Intel portion of the case, Intel's motion will propose
 9 that a different and shorter discovery and motion schedule be set for the severed Intel portion.
 10 Intel will be prepared to address at the CMC hearing any questions the Court may have about
 11 this severance sequencing proposal.

12 NETGEAR is of the view that joinder against the Defendants is improper and that
 13 Plaintiff should be required to show cause for why joinder is proper. NETGEAR believes that
 14 severance of Plaintiff's claims against NETGEAR into a separate action is the proper remedy for
 15 the misjoinder.⁴

16 Plaintiff does not believe that it would be appropriate to sever and stay any portion of this
 17 case. Defendants and Intel have already stayed the case for nearly five years pending two
 18 consecutive *ex parte* reexaminations. Intel and its customers represent less than a third of the
 19 parties involved in this case, and the question of whether Intel products infringe the '577 Patent
 20 will not necessarily resolve infringement issues related to other non-Intel products. Plaintiff is
 21 willing to discuss potential ways to streamline the case with Defendants and Intel and will
 22 continue such discussions in the coming months. If and when Intel and/or Defendants file the
 23 motions they mention above, Plaintiff will respond accordingly.

24 **XVIII. TRIAL**

25 Intel and Defendants reserve the right to seek separate jury trials based on the alignment

26
 27 ⁴ If the claims against some or all the parties are severed, the various discovery limitations now
 28 in effect will need to be revisited.

1 of parties and issues that remain for trial following dispositive motion practice. Defendants and
2 Intel anticipate that a jury trial of all issues presently in the case would take approximately
3 fifteen (15) to twenty (20) days. Plaintiff plans to try this case to a jury and anticipates that a
4 jury trial would take approximately five (5) to seven (7) days.

5 **XIX. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS**

6 All parties have filed a Certification of Interested Entities or Persons.

7 **XX. PROFESSIONAL CONDUCT**

8 All attorneys of record for the parties have reviewed the Guidelines for Professional
9 Conduct for the Northern District of California.

10 **XXI. REQUIREMENTS PER N.D. CAL PATENT LOCAL RULES**

11 As required by the Patent Local Rules, the parties discussed each of the topics listed in
12 Patent Local Rule 2-1 during their meet and confer. In regards to scheduling and the claim
13 construction hearing, the parties believe it is too early to propose a format for the hearing given
14 the number of potential claims at issue. The parties propose submitting a proposed format for
15 the hearing as part of the Joint Claim Construction and Prehearing Statement that they submit
16 pursuant to Patent Local Rule 4-3.

17 In regard to educating the court on the technology at issue, the parties propose a half-day
18 technology tutorial during the week of the Markman hearing.

19 **XXII. MISCELLANEOUS TOPICS**

20 The parties agree to electronic e-mail service of all discovery requests and responses to
21 discovery requests pursuant to Fed. R. Civ. P. 5 and 6.

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DATED: February 6, 2015

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1 **CONSENT TO FILING PURSUANT TO GENERAL ORDER 45(X)**

2 The undersigned hereby attests that written concurrence in the filing of the **Joint Case**
3 **Management Statement** has been obtained from each of the parties listed in the signature block
4 above.

5 Dated: February 6, 2015

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11 **Andrew J. Wright**

12 **NIX, PATTERSON & ROACH, L.L.P.**

13 **CERTIFICATE OF SERVICE**

14
15 The undersigned hereby certifies that the foregoing document was electronically filed in
16 compliance with Local Rule CV-5 and served via the Court's electronic filing system on all
17 counsel who have consented to electronic service on February 6, 2015.

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21 **Andrew J. Wright**

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23 **NIX, PATTERSON & ROACH, L.L.P.**